Ngan Chin Wen v Panin International Credit (S) Pte Ltd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–02–1094 OF 2001

MOKHTAR SIDIN, MOHD SAARI AND ABDUL AZIZ JJCA

28 MAY 2003

Civil Procedure *— Reciprocal enforcement of judgments — Registration of judgment obtained for default of appearance — Default judgment obtained in High Court of Singapore — Appeal against decision to register Singapore judgment in Malaysia — Application for stay of execution pending appeal — Whether application for stay should be granted*

Civil Procedure *— Writ of summons — Service — Service of writ issued by Singapore High Court on applicant through agent — Whether mode of service ultra vires O 65 of the Rules of the High Court 1980*

The applicant, a Malaysian, was carrying on business at Kuala Lumpur. The respondent was a company based in Singapore. On 22 December 1999, the respondent obtained judgment in default against the applicant at the High Court in Singapore ('the Singapore judgment'). Service of the writ of summons had been effected on the applicant in Kuala Lumpur by personal service through an employee of Skrine & Co of Kuala Lumpur, the firm of solicitors appointed by the respondent's solicitors in Singapore to effect service of the writ. An application was filed by the respondent at the High Court of Malaya at Kuala Lumpur to register the Singapore judgment pursuant to s 4(2) of Reciprocal Enforcement of Judgment Act 1958 ('the Act'). The application was dealt with inter partes, with the appellant not only opposing the application but also applying for the respondent's application to be struck out. The High Court ordered registration of the Singapore judgment and dismissed the appellant's striking out application. The appellant then filed an appeal to the Court of Appeal against the High Court's decision. Meanwhile, the applicant applied to the High Court for a stay of execution of its decision pending the appeal to the Court of Appeal, so that the Singapore judgment would not be registered and executed. The High Court refused the application for a stay. This was the applicant's application for a stay of execution of the High Court's decision. The ground relied upon by the applicant in support of his application for a stay was that, under O 79 r 4(1)(2) of Rules of Court 1996 (Singapore), a default judgment in a moneylender's action shall not be entered without the leave of the court and the application for leave must be served on the defendant. The applicant's contention was that the Singapore judgment was irregular and not valid and ought not to be registered in Malaysia because there was no leave to enter the Singapore judgment. The other point raised by the applicant was that the Singapore High Court had no jurisdiction to enter the default judgment against him because he had never submitted to the jurisdiction of that court.

Held, allowing the application by a majority: A

(1) (**Mohd Saari** and **Mokhtar Sidin JJCA**) The service of the writ issued by Singapore High Court on the applicant through an agent was ultra vires O 65 of the Rules of the High Court 1980. In the case of *United Overseas Bank Ltd v Wong Hai Ong* [1999] 1 MLJ 474, the High Court had held, inter alia, that O 11 B r 3(8)(a) of the Rules of Court (Singapore) cannot be read as allowing the service of the writ issued by the Singapore High Court in Malaysia by a private agent because that procedure was only allowed in Malaysia in respect of processes originating in Malaysia and not foreign process. However, in *Saeed U Khan v Lee Kok Hooi* [2001] 5 MLJ 416, the learned High Court judge C there disagreed with the ratio in *United Overseas Bank*'s case. These conflicting decisions had provided a ground for the appellate court to determine the issue, meaning the applicant had an arguable case (see pp 286H, 287C, F–G).

(2) (**Mohd Saari** and **Mokhtar Sidin JJCA**) The respondent was D based in Singapore and did not have assets within the jurisdiction of the Court of Appeal. If the applicant were to settle the judgment sum, which was a substantial amount, there was a strong likelihood that the applicant may not be compensated or restituted in the event of the applicant succeeding in the appeal. E This would render the applicant's appeal nugatory. Further, applying the principles as enunciated in *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* and *Alexander v Cambridge Credit Corp Ltd* to the facts and circumstances of the present case, it was clear that this was a proper case for stay to be granted (see pp 287G–H, 288F); *Ming Ann Holdings Sdn Bhd v Danaharta* F *Urus Sdn Bhd* [2002] 3 MLJ 49 and *Alexander v Cambridge Credit Corp Ltd* (1985) 10 ACLR 42 followed.

(3) (per **Abdul Aziz JCA** dissenting) Section 5 of the Act enabled a judgment debtor to apply for the setting aside of the registration of a foreign judgment upon specific grounds. Order 67 r 5 of the G RHC required an order for the registration of a foreign judgment to be served on the judgment debtor and stating therein the period within which an application may be made to set aside the registration. After registration, O 67 r 7 of the RHC required notice of the registration to be served on the judgment debtor and such notice would state the period within which an application H may be made to set aside the registration. Order 67 r 10 of the RHC prohibited the issuance of execution on a registered judgment until after that period or, if an application for setting aside was made, until the application was finally determined. The judgment debtor's interests were protected because he would be given the opportunity to apply to set aside the registration and I execution would not issue until after his application was finally determined. It was also clear that the Act, by providing for

application for setting aside for the aggrieved judgment debtor, did not envisage the need for an appeal against an order for registration (see pp 288H–289D).

(4) (per **Abdul Aziz JCA** dissenting) The irregularity and consequent invalidity of a foreign judgment was not specified in the Act as a ground for setting aside the registration of the foreign judgment. This was because the courts of one country should not adjudicate on the judgment of the courts of another country. If there were grounds to invalidate a foreign judgment, an application should be made to the original court to set aside the judgment or an appeal be made to the appellate court of the country of the original court. If not, the registering court had to accept the foreign judgment as regular and it cannot entertain any attempt to show that the foreign judgment was not regular. In the instant case, there was no attempt by the applicant to have the Singapore judgment set aside for non-compliance with O 79 r 4(1)(2) of the Rules of Court (Singapore) (see p 290F–H).

(5) (per **Abdul Aziz JCA** dissenting) Under s 5(1)(a)(ii) of the Act, our High Court can determine whether the High Court of Singapore had jurisdiction in the circumstances of the case and if the High Court of Singapore had no jurisdiction, the registration of the judgment obtained from the High Court of Singapore would be set aside (see pp 290I–291A).

(6) (per **Abdul Aziz JCA** dissenting) In respect of the applicant's contention that the Singapore High Court would only have jurisdiction if he had submitted himself to its jurisdiction, s 16(1)(a)(ii) of the Supreme Court of Judicature Act (Cap 322) (Singapore) provided, inter alia, that the High Court in Singapore shall have jurisdiction to hear and try any action in personam where the defendant was served with a writ or other originating process '... outside Singapore in the circumstances authorized by and in the manner prescribed by Rules of Court ...'. By virtue of O 11 r 3(8)(a) and O 11 r 4(2) of the Rules of Court 1996 (Singapore), read with O 10 r 1(1) of the RHC, service of the writ on the applicant by an agent had been effected 'in circumstances authorized by and in the manner prescribed by Rules of Court' (see pp 291G–H, 292B–E).

(7) (per **Abdul Aziz JCA** dissenting) If the question of service of the writ in the instant case were to be decided on the basis of O 65 of the RHC, then of course service by agent would not be an authorized mode of service because under O 65, service must be by a process server. However, O 65 of the RHC did not come into play in this case as O 65 was concerned with service of a foreign writ in Malaysia, whereas service for the question of the jurisdiction of the Singapore High Court was to be determined in accordance with s 16(1)(a)(ii) of the Supreme Court of Judicature Act (Cap 322) (Singapore). Furthermore, O 65 did not stipulate

that its provisions constituted the only allowed mode of service of a foreign process in Malaysia. In any case, the provisions of rr 3 and 4 of O 65 of the RHC applied only in cases where there was a government-to-government request for service of a foreign process on a person in Malaysia. Order 65 of the RHC did not lay down that service of a foreign process in Malaysia may only be done on a government-to-government request (see pp 294B–E, I–295A).

(8) (per **Abdul Aziz JCA** dissenting) The appellant's appeal, if successful, would not have been rendered nugatory even though his application for stay was refused as the appellant could seek recovery of the judgment sum paid to the respondent in the Republic of Singapore. There was no evidence to throw doubt on the respondent's ability to refund the judgment sum (see p 295B–C).

[Bahasa Malaysia summary

Pemohon, seorang warganegara Malaysia, telah menjalankan perniagaan di Kuala Lumpur. Responden adalah sębuah syarikat yang terletak di Singapura. Pada 22 Disember 1999, responden telah mendapat penghakiman ingkar terhadap pemohon di Mahkamah Tinggi di Singapura ('penghakiman Singapura tersebut'). Penyampaian writ saman tersebut telah dilaksanakan ke atas pemohon di Kuala Lumpur melalui penyampaian kediri melalui seorang pekerja Skrine & Co di Kuala Lumpur, firma peguamcara-peguamcara yang telah dilantik oleh peguamcara-peguamcara responden di Singapura untuk melaksanakan penyampaian writ tersebut. Satu permohonan telah difailkan oleh responden di Mahkamah Tinggi Malaya di Kuala Lumpur bagi mendaftar penghakiman Singapura tersebut menurut s 4(2) Akta Penguatkuasa Salingan Hukuman 1958 ('Akta tersebut'). Permohonan tersebut telah dibicarakan secara inter partes, di mana perayu bukan sahaja membangkang permohonan tersebut tetapi juga memohona agar permohonan responden dibatalkan. Mahkamah Tinggi telah memerintahkan penghakiman Singapura tersebut didaftarkan dan menolak permohonan pembatalan perayu. Perayu kemudian telah memfailkan ke Mahkamah Rayuan terhadap keputusan Mahkamah Tinggi. Sementara itu, pemohon telah memohon ke Mahkamah Tinggi untuk satu penggantungan perlaksanaan keputusannya sementara menunggu rayuan Mahkamah Rayuan, supaya penghakiman Singapura tersebut tidak didaftar dan dilaksanakan. Mahkamah Tinggi telah menolak permohonan pemohon untuk satu penggantungan perlaksanaan keputusan Mahkamah Tinggi. Alasan yang pemohon bergantung kepada bagi menyokong permohonannya untuk satu penggantungan adalah di mana, di bawah A 79 k 4(1)(2) Kaedah-Kaedah Mahkamah 1996 (Singapura), satu penghakiman ingkar dalm satu tindakan peminjam wang tidak boleh dimasuki tanpa kebenaran mahkamah dan permohonan untuk kebenaran hendaklah

A disampaikan ke atas defendan. Hujah pemohon adalah bahawa penghakiman Singapura tersebut di luar aturan dan tidak sah dan tidak patut didaftarkan di Malaysia kerana tiada kebenaran diberikan untuk memasukkan penghakiman Singapura tersebut. Satu lagi perkara yang ditimbulkan oleh pemohon adalah bahawa penghakiman Singapura tersebut tidak mempunyai bidang kuasa untuk memasuki
B penghakiman ingkar terhadap beliau kerana beliau tidak pernah menyerah kepada bidang kuasa mahkamah tersebut.

Diputuskan, membenarkan permohonan tersebut:

C (1) (oleh **Mohd Saari** and **Mokhtar Sidin HHMR**) Penyampaian writ yang dikeluarkan oleh Mahkamah Tinggi Singapura ke atas pemohon melalaui seorang ejen adalah ultra vires A 65 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Dalam kes *United Overseas Bank Ltd v Wong Hai Ong* [1999] 1 MLJ 474, Mahkamah Tinggi telah memutuskan, antara lain, bahawa A 11
D k 3(8)(a) Kaedah-Kaedah Mahkamah (Singapura) tidak boleh dibaca sebagai membenarkan penyampaian writ yang dikeluarkan oleh Mahkamah Tinggi Singapura di Malaysia oleh seorang ejen persendirian kerana prosedur tersebut hanya dibenarkan di Malaysia berhubung proses yang bermula di Malaysia dan bukan satu proses luar negara. Namun begitu, dalam *Saeed U Khan v Lee*
E *Kok Hooi* [2001] 5 MLJ 416, hakim Mahkamah Tinggi yang bijaksana di sana tidak bersetuju dengan ratio dalam kes *United Overseas Bank*. Keputusan-keputusan yang bercanggah ini telah memberikan alasan kepada mahkamah rayuan untuk menentukan persoalan, iaitu sama ada pemohon mempunyai satu kes yang
F boleh dibicarakan atau tidak (lihat ms 286H, 287C, F–G).

(2) (oleh **Mohd Saari** dan **Mokhtar Sidin HHMR**) Responden terletak di Singapura dan tidak mempunyai apa-apa aset dalam bidang kuasa Mahkamah Rayuan. Sekiranya pemohon menyelesaikan jumlah penghakiman tersebut, yang merupakan satu jumlah yang besar, terdapat kemungkinan besar pemohon
G tidak akan diberikan pampasan atau restitusi sekiranya pemohon berjaya dalam rayuan tersebut. Ini akan mengakibatkan rayuan pemohon menjadi tidak berguna. Tambahan pula, dengan memakai prinsip-prinsip yang dinyatakan dalam *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* dan *Alexander v*
H *Cambridge Credit Corp Ltd* kepada fakta-fakta dan keadaan-keadaan kes semasa, ia adalah jelas bahawa ini adalah satu kes yang betul untuk penggantungan dibenarkan (lihat ms 287G–H, 288F); *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* [2002] 3 MLJ 49 dan *Alexander v Cambridge Credit Corp Ltd* (1985) 10 ACLR 42 diikut.

I (3) (oleh **Abdul Aziz HMR** menentang) Seksyen 5 Akta tersebut membenarkan seorang penghutang penghakiman memohon untuk mengenepikan pendaftaran satu penghakiman luar negara

atas alasan-alasan yang spesifik. Aturan 67 k 5 KMT menghendaki satu perintah pendaftaran satu penghakiman luar negara disampaikan ke atas penghutang penghakiman dan menyatakan di dalamnya tempoh masa satu permohonan boleh dibuat untuk mengenepikan pendaftaran tersebut. Selepas pendaftaran, A 67 k 7 KMT menghendaki satu notis pendaftaran disampaikan ke atas penghutang penghakiman dan notis tersebut akan menyatakan tempoh masa satu permohonan boleh dibuat untuk mengenepikan pendaftaran. Aturan 67 k 10 KMT menghalang pengeluaran perlaksanaan ke atas satu penghakiman yang telah didaftarkan sehingga tempoh atau, jika satu permohonan untuk mengenepikan dibuat, sehingga permohonan tersebut akhirnya ditetapkan. Kepentingan penghutang penghakiman dilindungi kerana beliau akan diberikan peluang untuk memohon mengenepikan pendaftaran dan perlaksanaan tidak akan dikeluarkan sehingga permohonan beliau akhirnya ditentukan. Ia juga jelas bahawa Akta tersebut, dengan membenarkan permohonan untuk mengenepikan kepada penghutang penghakiman yang terlibat, tidak membayangkan keperluan untuk satu rayuan terhadap satu perintah untuk pendaftaran (lihat ms 288H–289D).

(4) (oleh **Abdul Aziz HMR** menentang) Luar aturan dan seterusnya ketidaksahan satu penghakiman luar negara tidak dispesifikasikan dalam Akta tersebut sebagai satu alasan untuk mengenepikan pendaftaran penghakiman luar negar tersebut. Ini adalah kerana mahkamah-mahkamah sesebuah negara tidak sepatutnya mengadili penghakiman mahkamah-mahkamah negara-negara lain. Sekiranya terdapat alasan-alasan untuk mentaksahkan satu penghakiman luar negara, satu permohonan hendaklah dibuat kepada mahkamah asal negara untuk mengenepikan penghakiman tersebut atau satu rayuan dibuat kepada mahkamah rayuan negara mahkamah asal tersebut. Jika tidak, mahkamah yang membuat pendaftaran hendaklah menerima penghakiman luar negara sebagai mengikut aturan dan tidak boleh melayan apa-apa percubaan untuk menunjukkan bahwa penghakiman luar negara adalah tidak mengikut aturan. Dalam kes semasa, tiada percubaan oleh pemohon untuk mengenepikan penghakiman Singapura tersebut kerana tidak mematuhi A 79 k 4(1)(2) Kaedah-Kaedah Mahkamah (Singapura) (lihat ms 290F–H).

(5) (oleh **Abdul Aziz HMR** menentang) Di bawah s 5(1)(a)(ii) Akta tersebut, Mahkamah Tinggi kita boleh menentukan sama ada Mahkamah Tinggi Singapura mempunyai bidang kuasa dalam keadaan suatu kes dan jika Mahkamah Tinggi Singapura tidak mempunyai bidang kuasa, pendaftaran penghakiman yang diperolehi daripada Mahkamah Tinggi Singapura akan diketepikan (lihat ms 290I–291A).

(6) (oleh **Abdul Aziz HMR** menentang) Berhubung hujah pemohon bahawa Mahkamah Tinggi Singapura akan hanya mempunyai

bidang kuasa jika beliau menyerahkan diri beliau kepada bidang kuasanya, s 16(1)(a)(ii) Akta Kehakiman Mahkamah Agong (Bab 322) (Singapura) memperuntukkan, antara lain, bahawa Mahkamah Tinggi di Singapura hendaklah mempunyai bidang kuasa untuk mendengar dan membicarakan apa-apa tindakan in personam di mana defendan disampaikan satu writ atau proses pemula lain '... outside Singapore in the circumstances authorized by and in the manner prescribed by Rules of Court ...'. Menurut A 11 k 3(8)(a) dan A 11 k 4(2) Kaedah Mahkamah 1996 (Singapura), dibaca dengan A 10 k 1(1) KMT, penyampaian writ ke atas pemohon oleh seorang ejen telah dilaksanakan 'in circumstances authorized by and in the manner prescribed by Rules of Court' (lihat ms 291G–H, 292B–E).

(7) (oleh **Abdul Aziz HMR** menentang) Sekiranya persoalan tentang penyampaian writ dalam kes semasa diputuskan berdasarkan A 65 KMT, maka sememangnya penyampaian oleh ejen bukan satu cara penyampaian yang sah kerana di bawah A 65, penyampaian mestilah oleh seorang penyampai proses. Namun begitu, A 65 KMT tidak terpakai dalam kes ini kerana A 65 adalah berkenaan penyampaian satu writ luar negara di Malaysia, sementara penyampaian berhubung persoalan bidang kuasa Mahkamah Tinggi Singapura perlu ditentukan menurut s 16(1)(a)(ii) Akta Kehakiman Mahkamah Agong (Bab 322) (Singapura). Tambahan lagi, A 65 tidak menetapkan bahawa peruntukannya membentuk satu-satunya cara proses penyampaian luar negara di Malaysia. Dalam apa keadaanpun, peruntukan-peruntukan kk 3 dan 4 A 65 KMT hanya terpakai dalam kes-kes di mana terdapat permintaaan kerajaan-kepada-kerajaan untuk proses penyampaian luar negara ke atas seseorang di Malaysia. Aturan 65 KMT tidak menerangkan bahawa proses penyampaian luar negara di Malaysia hanya boleh dilakukan atas satu permintaaan kerajaan-kepada-kerajaan (lihat ms 294B–E, I–295A).

(8) (oleh **Abdul Aziz HMR** menentang) Rayuan perayu, jika berjaya, tidak boleh dianggap tidak berguna meskipun permohonannya untuk penggantungan ditolak kerana perayu boleh mendapat kembali jumlah penghakiman yang telah dibayar kepada responden di Singapura. Tiada keterangan yang menunjukkan apa-apa keraguan terhadap kemampuan responden untuk membayar balik jumlah penghakiman tersebut (lihat ms 295B–C).]

Notes

For cases on the registration of judgments obtained for default of appearance, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) para 5048.

For cases on services of writ, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 6618–6627.

Cases referred to

Alexander v Cambridge Credit Corpn Ltd (1985) 10 ACLR 42 (folld)
Commerzbank (South East Asia Ltd) v Tow Kong Liang [2002] 2 MLJ 353 (refd)
Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd [2002] 3 MLJ 49 (folld)
Saeed U Khan v Lee Kok Hooi [2001] 5 MLJ 416 (refd)
United Overseas Bank Ltd v Wong Hai Ong [1999] 1 MLJ 474 (refd)

Legislation referred to

Reciprocal Enforcement of Judgments Act 1958 ss 4(2), 5(1)(a)(ii), (v)
Rules of Court 1996 [Sing] O 11 rr 3(8)(a), 4(2)(c), O 79 r 4(1)(2)
Rules of the High Court 1980 O 10 r 1(1), O 11 r 6(1)(b)(ii), 6(2)(b)(ii), O 62 r 3, O 65 rr 2(3), 3(3), O 67 rr 5, 7, 10
Supreme Court of Judicature Act [Sing] s 16(1)(a)(ii)

Appeal from: Originating Summons No R2–24–23 of 2000 (High Court, Kuala Lumpur)

Allen Miranda a/l Emmanuel (*Ng Thiang Tuan* with him) (*Syarikat Kam Woon Wah & Co*) for the applicant/defendant.
Maniam a/l Kuppusamy (*Kamil Azman bin Abdul Razak* with him) (*Skrine*) for the respondent/plaintiff.

Mohd Saari JCA (delivering majority judgment): On 4 January 2002, the applicant applied to the High Court for stay of execution of the court order granted on 12 December 2001 pending appeal. The learned judge dismissed the application on 14 May 2002, hence this application for stay.

The facts may briefly be stated as follows. At all material times, the applicant, a Malaysian, was carrying on business at Ngan & Ngan Holdings Sdn Bhd, Tingkat 10, Wisma Central, Jalan Ampang, 50450 Kuala Lumpur. The respondent was a company based in Singapore.

On 22 December 1999, the respondent obtained judgment in default ('the said judgment') against the applicant at the High Court Singapore vide Suit No 1404 of 1999. Pursuant to Originating Summons No R2–24–23 of 2000 filed by the respondent at High Court Malaya at Kuala Lumpur, the learned judge granted leave to the respondent for the said judgment to be registered pursuant to s 4(2) of Reciprocal Enforcement of Judgment Act 1958 ('the Act').

In the present case, writ issued by Singapore High Court was served on the applicant through an agent, which act was ultra vires of our law namely O 65 of the Rules of the High Court 1980 ('the RHC'). In his written submission, the learned counsel for the applicant cited the recent decision of Wahab J in *Commerzbank (South East Asia Ltd) v Tow Kong Liang* [2002] 2 MLJ 353, which followed the ratio in the case of *United Overseas Bank Ltd v Wong Hai Ong* [1999] 1 MLJ 474. In *United Overseas Bank* at p 483, Ian Chin J said:

A In my view, there is absolutely no reason why service of the legal process of Singapore or Brunei Darussalam cannot and should not be done through the special provision of the Singapore O 11 r 3(8) which is by our judicial officer and that, in my view, is the only permissible method of service other than the method under O 65. The fact that service by an agent is not expressly prohibited does not mean that the Singapore O 11 r 3(8) need not be B complied with. That provision and O 65 are enacted for observance and not to be ignored, and, implicitly, all other methods of service will not be allowed since it amounts to the exercise of the jurisdiction of the Singapore courts in Malaysia. Therefore, in my respectful view, the said opinion expressed in this regard by *Malaysian High Court Practice* (Vol 1, 1998 Ed) at pp 4424–4454 is not correct.

C In so far as the Singapore O 11 r 3(8)(a) is concerned, it cannot be read as allowing the service of the writ in Malaysia by a private agent as that is only allowed in Malaysia in respect of processes originating in Malaysia and not foreign process.

Further, his Lordship said at p 484:

D It was mentioned that the defendant should have taken action in Singapore to set aside the service and since he had not done so, he should not be allowed to challenge the validity of the service, citing *Harrisons Trading (Peninsular) Sdn Bhd v Juta Perkara Sdn Bhd & Ors* [1977] 2 SLR 496. No doubt he could do that but the failure to do so does not mean that this court is precluded from considering and taking into account the fact that the service of the E writ was in breach of the said rules and that it would be contrary to Malaysia's public policy to enforce such a judgment. There is more to it than just the right of the defendant. It is a matter affecting the sovereignty of Malaysia and the observance of the said rules. This is a matter which the said Act allows the court to take into consideration irrespective of whether action had been taken to set aside the service. It does not injustice to the plaintiff as F all they need to do is to have the said judgment set aside and then to serve the writ through the proper channel and in accordance with the Singapore O 11 r 3(8) or O 65.

However, in *Saeed U Khan v Lee Kok Hooi* [2001] 5 MLJ 416, the learned trial judge disagreed with the ratio in *United Overseas Bank*. Be that as it G may, for purpose of this proceeding, in view of the conflicting decision, it affords a ground for the appellate court to determine the issue, meaning the applicant had an arguable case.

Further, for the applicant, it is argued that the respondent which was based in Singapore did not have assets within the jurisdiction of this court. The judgment sum was substantial. If the applicant were to settle the H judgment sum, there is strong likelihood that the applicant may not be compensated or restituted in the event of the applicant succeeding in the appeal. This would render the applicant's appeal nugatory. We agree.

Question posed by the present application, should stay of execution of the court order dated 12 December 2001 be granted? In this regard, it is I pertinent to refer to the Court of Appeal case in *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* [2002] 3 MLJ 49, where in that case, Abdul Hamid Mohamad JCA at p 69 observed:

I agree that in an application for a stay of execution, that the appeal, if successful, would be rendered nugatory is the 'paramount consideration' or by whatever name it is called. And, I do not think that it matters whether it is considered under the head of 'special circumstances' or not, so long as it is considered and so long as he does not go so far as to say that no other factors may be considered because this is an exercise of discretion, and therefore all the relevant factors should be considered.

My difficulty with *See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors* [1995] 3 MLJ 598 if it were to be applied to an application for a stay of execution is that that the learned judge found that the appeal would be rendered nugatory because it is doomed to failure. As I understand it, the nugatory test that the courts talk about in an application for a stay of execution goes to the subject matter of the case, not the merits of the appeal. In other words, the appeal, if successful, is worthless because the appellant cannot be put in its former position.

In *Alexander v Cambridge Credit Corpn Ltd* (1985) 10 ACLR 42, Kirby J, in delivering the judgment of the Court of Appeal of New South Wales, had this to say:

(i) where 'the balance of convenience' is in favour of the applicant/appellant (see also *AG v Emerson & Ors; Clyne v Deputy Commissioner of Taxation*), and such balance of convenience may sometimes be maintained by the stay being made subject to certain conditions imposed by the court (as per provision '... may order ... on such terms as it thinks fit', in O 45 r 11 of the Rules, and also see *Andrews & Anor v John Fairfax & Sons Ltd*);

(ii) where 'it is apparent that unless a stay is granted an appeal will be rendered nugatory ...' (see also *Wilson v Church No 2* and *Scarborough v Lew's Junction Stores Pty Ltd*); and

(iii) that the applicant/appellant 'has an arguable' appeal.

Thus, in applying the principles as enunciated above to the facts and circumstances of the present case, we have no hesitation in finding that this is a proper case for stay to be granted. Accordingly, we order in terms as prayed. Cost to be in the cause.

My learned brother Mokhtar Sidin JCA had seen this judgment in draft and expressed his concurrence with the judgment.

Abdul Aziz JCA (dissenting): Since the appellant's notice of motion for a stay of execution pending appeal, which I thought should be dismissed, was, in submission before us, objected to by the respondents as an abuse of the process of the court and as premature, I think it would be appropriate for me to begin by setting out the position of the law in the matter in question, on which the objection was based.

The notice of motion had to do with the registration of a foreign judgment under the Act so that it may be enforced in this country as a judgment of our High Court. Section 5 of the Act enables a judgment debtor to apply for the setting aside of the registration of a foreign judgment and sets out various grounds on which it is either mandatory or discretionary to set aside the registration. One of the grounds on which it becomes mandatory to set aside registration is that in s 5(1)(a)(ii) of the

A Act, namely, 'that the courts of the country of the original court had no jurisdiction in the circumstances of the case'. Order 67 r 5 of the RHC requires an order for the registration of a foreign judgment to be served on the judgment debtor and to state the period within which an application may be made to set aside the registration. After registration, O 67 r 7 of the RHC requires notice of the registration to be served on the judgment B debtor, which shall, besides other things, state the period within which an application may be made to set aside the registration. Order 67 r 10 of the RHC prohibits the issuance of execution on a registered judgment until after that period or, if an application for setting aside is made, until the application is finally determined. It is clear therefore that a judgment debtor C need not be served with an application for registration and that the application may be made ex parte. The judgment debtor's interests are protected because he is given the opportunity to apply to set aside the registration and execution will not issue until after his application is finally determined. It is accordingly also clear that the Act, by providing for application for setting aside for the aggrieved judgment debtor, does not D envisage the need for an appeal against an order for registration.

The respondents, a company incorporated under the laws of the Republic of Singapore, claiming to be licensed moneylenders, obtained judgment in default of appearance in the High Court of that country against the appellant on a claim on a promissory note. The respondents applied in the High Court at Kuala Lumpur for registration of the judgment under the E Act. The application was, however, dealt with inter partes, with the appellant not only opposing the application but also applying, that it be struck out. The High Court ordered registration and dismissed the appellant's striking out application (that is to say, the deputy registrar did so and the judge in chambers dismissed the appellant's appeals against the F two decisions). At the same time, the judge also dismissed the appellant's application to adduce fresh evidence in the appeal to the judge. Against all the three decisions of the judge, the appellants filed appeals to this court. Accordingly, they applied to the High Court for a stay of execution of its decision pending the appeal, obviously in order that the judgment would not be registered and executed. The High Court refused a stay and the G appellant then put in an application to this court by notice of motion for a stay.

We were informed by the respondents' counsel from the bar that notice of the registration of the judgment had not been served on the appellant and therefore the appellant did not need to worry about execution. He should, it was submitted, wait to be served with the notice, then apply within the H given time to set aside the registration and until his application is decided the rules prohibit execution, and therefore no stay needed to be applied for.

The application for a stay of execution was, therefore, it was submitted, an abuse of process and was premature. It was a submission that seemed to recognize that even though the order for registration of the judgment had I been obtained inter partes, the appellant could properly apply to set aside the registration (most likely on grounds that had been argued and decided) instead of appealing to this court.

In arriving at the opinion that the appellant's notice of motion should be dismissed, I did not find it necessary to form any opinion on the preliminary objection. I took the application as it was and arrived at the opinion that even if an appeal against the order for registration, and the consequent application for a stay, were proper proceedings, the application for a stay could not succeed. In other words, I took the appellant on the course that he had chosen and decided that that course would lead to no success.

I did, however, as far as the question of merits of the appeal was concerned, form the view that the appellant, by appealing, was not entitled to more than what the Act intended, that is to say, that the remedy on appeal could only be the remedy of setting aside provided by the Act, and that setting aside could only be ordered on some ground prescribed by the Act.

In his affidavit in support of his application to this court for a stay, the appellant expressly relied on only one point of merit in the appeal. The point was this. According to O 79 r 4(1)(2) of Rules of Court 1996 of the Republic of Singapore ('the Singapore Rules'), in a moneylender's action a judgment in default of appearance or defence shall not be entered without the leave of the court and the application for leave must be served on the defendant. It would be the appellant's contention in the appeal that the judgment in default was entered without leave. The issue was not originally raised before the deputy registrar. It was sought to be raised in the appeal before the judge and for that an application was made to adduce in the appeal fresh evidence that there had been no application for leave. The application was dismissed and that decision is also under appeal. The appellant hoped to succeed in that appeal so that he could raise the issue of leave in the substantive appeal. It was submitted to us that since there was no leave to enter the judgment in default, the judgment was irregular and not valid and ought not to be registered.

The irregularity and consequent invalidity of a foreign judgment is not specified in the Act as a ground for setting aside the registration of the foreign judgment. I was of the view that the reason for that is because the courts of one country should not adjudicate on the judgment of the courts of another country. If you have grounds to invalidate a forerun judgment, you must apply to the original court to set aside the judgment or you must appeal to the appellate court of the country of the original court. If you do not do so, the registering court has to accept the judgment as regular and cannot entertain any attempt to show that it is not. In the present case, there was no attempt to have the judgment in default set aside for non-compliance with O 79 r 4(1)(2). I could not see any likelihood of the appellant succeeding in the appeal on that ground.

There was only one other point which, according to the appellant's affidavit in support of his application for a stay, the appellant intended to rely on to succeed in the appeal and that was the question of jurisdiction of the High Court of the Republic of Singapore. According to s 5(1)(a)(ii) that I have mentioned of the Act, our High Court can determine whether the

A High Court of Singapore had jurisdiction in the circumstances of the case and if it finds that there was no jurisdiction, the registration of the judgment shall be set aside.

Although sub-s (2) of s 5 of the Act sets out various circumstances in which, for the purposes of the section, the courts of the country of the B original court shall be deemed to have had jurisdiction, those circumstances are in my view only deeming circumstances and do not preclude a judgment creditor from showing that actually, in law, the courts of the country of the original court had jurisdiction.

The question of jurisdiction arose in this way. In para 8 of his affidavit dated 8 May 2000 in support of his striking out application, the appellant C stated his belief that the Singapore High Court had no jurisdiction to enter the default judgment because he had never submitted to the jurisdiction of that court. The paragraph evidenced the appellant's belief that for the purpose of s 5(1)(a)(ii) of the Act — that is to say, for the purpose of the question of setting aside the registration of the judgment on the ground that D the Singapore High Court had no jurisdiction — the Singapore High Court would only have jurisdiction if the appellant submitted to its jurisdiction. The respondents in para 9 of their affidavit dated 7 June 2002 contended that the Singapore High Court had full jurisdiction to enter the judgment. As I have related, the appellant lost in the High Court, the judgment in default was ordered to be registered, the appellant filed an appeal to this E court, failed to obtain from the High Court a stay pending appeal, and finally applied for a stay to this court. In para 14 of the appellant's affidavit dated 21 May 2002 in support of his stay application to this court, which was identical with para 6 of his affidavit dated 4 January 2002 in support of his earlier stay application to the High Court, the applicant said this in the first sentence:

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> Saya juga mempertikaikan perbuatan Pemiutang Penghakiman yang telah menggunakan s 16(1)(a)(11) Supreme Court of Judicature Act 1985 Singapura untuk menyatakan bahawa saya telah menyerah diri kepada bidang kuasa Mahkamah Tinggi Republik Singapura.

Rather strangely, those two paras 14 and 6, were placed in each case under G the heading of 'Keadaan Khas' (Special Circumstances).

It was apparent that in the High Court, against the appellant's contention that the Singapore High Court would only have jurisdiction if the appellant had submitted himself to its jurisdiction, the respondents had relied for jurisdiction on s 16(1)(a)(ii) of the Supreme Court of Judicature H Act (Cap 322) of the Republic of Singapore ('the Singapore Act'). As will later be seen, jurisdiction under that section is not dependent on submission to jurisdiction, so that it would have been illogical if, as alleged by the appellant in his affidavit, the respondents had actually resorted to s 16(1)(a)(ii) of the Singapore Act to claim that the appellant had submitted himself to the jurisdiction of the Singapore High Court. In his skeletal I submission for this court, in relation to the said paragraph of his affidavit, the appellant still maintained: 'Submission to the jurisdiction of the Singapore High Court may only be made expressly'. There was no express

argument against the respondents' reliance on s 16(1)(a)(ii) of the Singapore Act, except that there was mention of two conflicting decisions and about service of a writ of summons by an agent, which could have been intended to be used to support a point against reliance on that section. The two decisions were *Saeed U Khan v Lee Kok Hooi* and *Commerzbank (South East Asia Ltd) v Tow Kong Liang*.

It is necessary to reproduce s 16(1) of the Singapore Act:

> (1) The High Court shall have jurisdiction to hear and try any action in personam where:
> (a) the defendant is served with a writ or other originating process:
> (i) in Singapore in the manner prescribed by Rules of Court; or
> (ii) outside Singapore in the circumstances authorized by and in the manner prescribed by Rules of Court; or
> (b) the defendant submits to the jurisdiction of the High Court.

It is evident from the sub-s that submission to jurisdiction that the appellant contended was the only way by which the Singapore High Court could have jurisdiction is under para (b), which is separate from the basis for jurisdiction which the respondents relied on, namely that in para (a)(ii). According to that subsection, by Singapore law, where jurisdiction over an action in personam is concerned, the jurisdiction of the High Court depends either on voluntary submission to Jurisdiction or on service of the originating process. Where service is outside Singapore, the service must be 'in the circumstances authorized by and in the manner prescribed by Rules of Court'. If service on a defendant outside Singapore is in those circumstances and manner, the Singapore High Court shall have jurisdiction over the action.

In this case, service of the writ of summons had been effected on the appellant in Kuala Lumpur by personal service by an employee of Skrine of Kuala Lumpur, the firm of solicitors appointed by the respondents' solicitors in Singapore to effect service of the writ. The question to be answered then is whether that service was effected 'in circumstances authorized by and in the manner prescribed by Rules of Court'.

According to O 11 r 3(8)(a) of the Singapore Rules, 'Where the defendant is in Malaysia or Brunei Darussalam, the originating process ... may be served in accordance with r 4'. Paragraph (2) of r 4 provides for the manner of serving an originating process on a defendant in any country with respect to which there does not subsist a Civil Procedure Convention providing for service in that country of process of the Singapore High Court. There was no dispute that Malaysia is such a country. Paragraph (2) of r 4 provides for three modes of service, mode (c) being 'by a method of service authorized by the law of that country for service of any originating process issued by that country'. The question that then arises is: by Malaysian law what is the method of service authorized for service of an originating process issued by Malaysia? The Malaysian law is the RHC. If service of the Malaysian process is to be done in Malaysia, one of the required, and therefore authorized, methods is personal service by virtue of O 10 r 1(1) of the RHC, which was how the appellant was served. If service

of the Malaysian process is to be done outside Malaysia, O 11 r 6 of the RHC provides for several methods of, or rather avenues for, effecting service, one of which, whether or not there subsists a Civil Procedure Convention with respect to the country in which the defendant is to be served, is, according to paras (1)(b)(ii) and (2)(b)(ii), 'by the plaintiff or his agent', which was by whom the writ was served on the appellant in this case, namely by the agent of the respondents, who were the plaintiffs. It would appear from the citing of the aforementioned two cases in the appellant's skeletal submission that the appellant wanted to say that service by agent on him was not an authorized mode of service under Malaysian law. That is obviously untrue. If one were to go by the authorized method of service outside Malaysia, service 'by the plaintiff or his agent' is expressly authorized by O 11 r 6(1)(b)(ii) and 6(2)(b)(ii) of the RHC. If one were to go by the method for service in Malaysia, the method under O 10 r 1(1) of the RHC is personal service. Nothing is said, whether there or in O 62 r 3 of the RHC, which speaks of how personal service is to be effected, as to by whom it is to be effected. Since what is prescribed is the method and not the person, it should not matter by whom the service is effected so Iona as the prescribed method is followed. For service in Malaysia, service by the plaintiff is so obvious an avenue that the rules do not need to expressly authorize it. So is service by the plaintiff s agent. When one speaks of service by an agent being or not being allowed, one must be speaking, of service by some private agent of the plaintiff s as opposed to service by a governmental agency, such as a court process server, and not as opposed to service by the plaintiff himself. It is inconceivable that any legal regime would expect every plaintiff to serve the process himself. The great majority of them would have to employ an agent, such as their solicitors, who in turn would need to employ someone to actually effect the service. In the case of paras 1(b)(ii) and 2(b)(ii) of O 11 r 6 of the RHC, it is necessary to expressly state that the process may be served 'by the plaintiff or his agent', because' those paragraphs deal with service of our process in a foreign country and need to provide for service through the authorities there. The policy being to allow also the plaintiff or his agent to serve, they need to be expressly mentioned as otherwise it would be construed that service by them is not recognized.

Mention has been made of two cases cited by the appellant in relation to the issue of jurisdiction of the Singapore Hiah Court. Both were decisions of the High Court. In *Saeed U Khan v Lee Kok Hooi*, Faiza Tamby Chik J said at pp 420–421: 'It cannot be disputed that service by way of a private agent is an authorized method of service in Malaysia'. The case was not in favour of the appellants. In *Commerzbank (South East Asia Ltd) v Tow Kong Liang*, unlike in this case, the question of manner of service did not arise from a dispute as to the jurisdiction of the Singapore High Court. It arose as a reason for contending that the registration of a judgment of the Singapore High Court should be set aside on the ground, as provided in para (v) of s 5(1)(a) of the Act, 'that the enforcement of the judgment would be contrary to public policy'. In that case the Singapore writ was served personally in Malaysia (Johor Bahru) by an advocate and solicitor. The learned judge (Abdul Wahab b Patail J) considered that the service of the

writ of summons should have been done in accordance with O 65 of the RHC, under which service by an agent is not allowed because rr 2(3) and 3(3) provide that, 'Service shall be effected by the process server', meaning the process server of the High Court. The learned judge held that because service of the Singapore writ in Malaysia was not in accordance with O 65 of the RHC and was therefore an exercise of sovereignty in Malaysia without Malaysia's consent, the enforcement of the judgment in default of appearance that ensued would be contrary to public policy in Malaysia.

If the question of service that arose in this case in relation to the question of the jurisdiction of the Singapore High Court fell to be decided on the basis of O 65 of the RHC, then of course service by agent would not be an authorized mode of service because under O 65 service must be by a process server. But O 65 does not come into play in the question of service in this case. Order 65 concerns service of a foreign writ in Malaysia, whereas, as has been seen, service for the question of jurisdiction of the Singapore High Court is service in the circumstances authorized or manner prescribed by the Singapore Rules, and the effect of O 11 r 3(8)(a) and r 4(2)(c) of the Singapore Rules is, where the defendant is in Malaysia, to authorize a method of service that is authorized by the law of Malaysia for service of any originating process issued by Malaysia — not by another country — and our O 10 and O 11 either allows, by not prohibiting, service by an agent where service of the Malaysian process is to be in Malaysia or expressly allows service by an agent where the Malaysian process is to be served abroad.

I would not like to leave O 65 of the RHC and *Commerzbank* without observing that O 65 does not lay down that its provisions constitute the only allowed mode of service of a foreign process in Malaysia. Rules 2 and 3 are the material provisions. Paragraph (1) of r 2 states:

> (1) This rule applies in relation to the service of any process required in connection with civil proceedings pending before a court or other tribunal of a foreign country *where a letter of request from such a tribunal requesting service on a person in Malaysia* of any such process sent with the letter *is received by the Minister* and is sent by him to the High Court with an intimation that it is desirable that effect should be given to the request. (Emphasis added.)

Paragraph (1) of r 3 states:

> (1) This rule applies in relation to the service of any process required in connection with civil proceedings pending before a court or other tribunal of a foreign country, being a country with which there subsists a Civil Procedure Convention providing for service in Malaysia of process of the tribunals of that country, *where a letter of request from a consular or other authority of that country requesting service on a person in Malaysia* of any such process sent with the letter *is received by the Registrar.* (Emphasis added.)

It is obvious from the words that I have emphasized that the provisions of rr 3 and 4 are to apply only in cases where, to put it simply, there is a government-to-government request for service of a foreign process on a

person in Malaysia. Order 65 of the RHC does not lay down that service of a foreign process in Malaysia may only be done on a government-to-government request.

Since I could see no likelihood of the appellant succeeding in the appeal, I was of the view that stay of execution of the order to register the judgment ought to be refused.

The appellant argued that if stay was refused and execution proceeded and he settled the amount of the judgment, but his appeal ultimately was allowed, his appeal would have been rendered nugatory because he would not be able to recover from the respondents, a company incorporated in Singapore, the money that he had paid to them since they had no assets in Malaysia. I disagreed that the appeal would be rendered nugatory. The appellant could seek recovery in the Republic of Singapore. There was no evidence to throw doubt on the respondents' ability to refund the judgment sum. Even on that consideration alone, I was of the view that the stay sought, which was a stay of execution pending appeal, should be refused.

Application allowed by a majority.

Reported by Lim Lee Na